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IN THE

SUPREME COURT OF THE UNITED STATES

No. [redacted] 7

1968

SUSAN EPPERSON AND H. H. BLANCHARD, *Appellants*

v.

STATE OF ARKANSAS *Appellee*

APPEAL FROM THE SUPREME COURT OF ARKANSAS

BRIEF FOR APPELLEE

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 749

SUSAN EPPERSON AND H. H. BLANCHARD, ... *Appellants*

v.

STATE OF ARKANSAS ..... *Appellee*

APPEAL FROM
THE SUPREME COURT OF ARKANSAS

BRIEF FOR APPELLEE

SUMMARY OF BRIEF

The statutes involved herein do not deny due process of law because of vagueness and uncertainty because they were drafted after the opinion of *Scopes* v. *State*, 154 Tenn. 105, 289 S.W. 363, and with the holding of that case in mind. The statutes are clear, definite and valid inactments. The statutes are a valid exercise of the state's power to specify the curriculum in its public schools and is not an unreasonable encroachment upon Mrs. Epperson's freedom of speech.

The statutes do not deny the equal protection of the law because the separate classification of students attending public, parochial, or private schools is a valid classification. The state has a vital interest in its public schools and may validly exercise more control over them than over strictly private schools.

The statutes do not deny religious freedom but is in fact purely an Act of neutrality and insures the completeness of separation of church and state.

BRIEF

I

The Act Does Not Deny Due Process of Law.

For their first point appellants state that the statute conflicts with the due process clause of Amendment 14 to the Constitution of the United States in that it is vague and indefinite.

In reading appellants' complaint, we find the allegation that she (Mrs. Epperson) will violate the statutes unless they are declared unconstitutional. The complaint reads:

> (V) . . . Plaintiff intends to discuss and explain said theory or doctrine to her students notwithstanding the provisions of said statutes . . .
>
> (VIII) Plaintiff states that unless this Honorable Court enters its judgment and decree holding Arkansas Statutes 80-1627 and 80-1628 unconstitutional and void, plaintiff will be subject to fine and dismissal from her teaching position. Plaintiff states that the defendants will have no alternative but to dismiss plaintiff from her teaching position in the event the provisions of said act are invoked against plaintiff. . . .

It seems to us that appellant knew what the statutes meant when she filed her conplaint, and, therefore, it is absurd for her to now say that the statutes are vague and that she does not understand them.

The issue of vagueness was raised in *Scopes* v. *State*, 154 Tenn. 105, 289 S.W. 363, 53 A.L.R. 821 (1927), and

was discussed at length in the Court's opinion. The Tennessee statute is not nearly as definite and certain as the Arkansas statutes are; nevertheless, the Tennessee Court held that their statute was not vague and uncertain. It should be noted that the Arkansas statutes were drafted and passed in 1928, which was subsequent to the rendition of the *Scopes* decision in 1927, the Arkansas statutes being very carefully drawn in the light of the opinion in *Scopes*.

We quote below the pertinent part of the *Scopes* opinion and ask that the Court take particular note of the italicized portions thereof:

> While the act was not drafted with as much care as could have been desired, nevertheless there seems to be no great difficulty in determining its meaning. It is entitled:
>
> > "An act prohibiting the teaching of the evolution theory in all the Universities, normals and all other public schools of Tennessee, which are supported in whole or in part by the public school funds of the state, and to provide penalties for the violations thereof."
>
> Evolution, like prohibition, is a broad term. In recent bickering, however, evolution has been understood to mean the theory which holds that man has developed from some pre-existing lower type. This is the popular significance of evolution, just as the popular significance of prohibition is prohibition of the traffic in intoxicating liquors. It was in this sense that evolution was used in this act. It is in this sense that the word will be used in this opinion, unless the context otherwise indicates. It is only to the theory of the evolution of man from a lower type that the act before us was intended to apply and much of the discussion we have heard is beside this case. *The words of*

a statute, if in common use, are to be taken in their natural and ordinary sense. *O'Neal* v. *State,* 115 Tenn. 427, 3 L.R.A. (N.S.) 762, 90 S.W. 627; *State ex rel. Dolan* v. *Clarksville & R. Turnp. Co.* 2 Sneed, 90.

Thus, defining evolution, the act's title clearly indicates the purpose of the statute to be the prohibition of teaching in the schools of the state that man has developed or descended from some lower type or order of animals.

When the draftsman came to express this purpose in the body of the act, he first forbade the teaching of "any theory that denies the story of the divine creation of man, as taught in the Bible" — his conception evidently being that to forbid the denial of the Bible story would ban the teaching of evolution. To make the purpose more explicit, he added that it should be unlawful to teach "that man has descended from a lower order of animals."

Supplying the ellipsis in §1 of the act, it reads that it shall be unlawful for any teacher, etc., "to teach any theory that denies the story of the divine creation of man as taught in the Bible, and to teach instead [of the story on the divine creation of man as taught in the Bible] that man as descended from a lower order of animals."

The language just quoted illustrates what is called in rhetoric exposition by iteration. The different form of the iterated idea serves to expound the first expression of the thought. The undertaking of the statute was to prevent teaching of the evolution theory. It was considered this purpose could be effected by forbidding the teaching of any theory that denied the Bible story, but to make the purpose clear it was also forbidden to teach that man descended from a lower order of animals.

This manner of expression in written instruments is common, and gives use to the maxim maxim subordinate words and phrases are modified and limited to harmonize with each other of construction "noscitur a sociis." Under this and with the leading and controlling purpose or intention of the act. For example, see *Lewis' Southerland, Stat. Constr.* §§415 *et seq.; Caldwell & Co.* v. *Lea,* 152 Tenn. 48, 272 S.W. 715.

It thus seems plain that the Legislature in this enactment only intended to forbid teaching that man descended from a lower order of animals. The denunciation of any theory denying the Bible story of creation is restricted by the caption and by the final clause of §1.

So interpreted, the statute does not seem to be uncertain in its meaning nor incapable of enforcement for such a reason, notwithstanding the great argument to the contrary. The indictment herein follows the language of the statute. The statute being sufficiently definite in its terms, such an indictment is good. *State* v. *Odam,* 2 Lea, 220; *Villines* v. *State,* 96 Tenn. 141, 33 S.W. 922; *Griffin* v. *State,* 109 Tenn. 17, 70 S.W. 61. The assignments of error, which challenge the sufficiency of the indictment and the certainty of the act, are accordingly overruled.

It is contended that the statute violates §8 of article 1 of the Tennessee Constitution, and §1 of the 14th Amendment of the Constitution of the United States — the law of the land clause of the state constitution, and the due process of law clause of the federal Constitution, which are practically equivalent in meaning.

We think there is little merit in the contention. The plaintiff in error was a teacher in the public schools of Rhea county. He was an employee of the state of Tennessee or of a municipal agency

> of the state. He was under contract with the state to work in an institution of the state. He had no right or privilege to serve the state except upon such terms as the state prescribed. His liberty, his privilege, his immunity to teach and proclaim the theory of evolution, elsewhere than in the service of the state, was in no wise touched by this law.
>
> The statute before us is not an exercise of the police power of the state undertaking to regulate the conduct and contracts of individuals in their dealings with each other. On the other hand, it is an act of the state as a corporation, a proprietor, an employer. It is a declaration of a master as to the character of work the master's servant shall, or rather shall not perform. In dealing with its own employees engaged upon its own work, the state is not hampered by the limitations of §8 of article 1 of the Tennessee Constitution, nor of the 14th Amendment to the Constitution of the United States. (Emphasis supplied.)

In their attempt to show vagueness, appellees take certain words in the statute out of context and play with them, *e.g.*, the words "teach," and "textbook." They also play with the meaning of the word "evolution." Anyone can take words out of context, play with their meaning, and make any statute seem vague and uncertain. But, this is not the way the law looks at statutes.

In 16 Am. Jur. 2d, Sec. 552, Constitutional Law, Page 951, the principle of law is thus stated:

> "It is a general principle of statutory law that a statute must be definite to be valid. A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first

> essential of due process of law. *On the other hand, where words assailed, taken in connection with the context, are commonly understood, their use does not render a statute invalid. The same holds true as to an order of court.*" (Emphasis added.)

Words must be considered in context, or every statute could be struck down for vagueness.

Finally, we would like to quote more of the Am. Jur. section cited above:

> • • • A statute is not unconstitutionally vague merely because clearer and more precise language might have been used; the Constitution does not require impossible standards of statutory clearity, and does not require more than that the language convey sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. If a statute is so designed that persons of ordinary intelligence who would be law abiding can tell what conduct must be to conform to its requirements and it is suspectible of uniform interpretation and application by those charged with the responsibility of enforcing it, it is invulnerable to an attach for vagueness. Obviously, a statute is not unconstitutionally vague merely because it is stringent and harsh.
>
> The due process requirement of definiteness is especially important in its application to penal and criminal statutes. The legislature, in the exercise of its power to declare what shall constitute a crime or punishable offense, must inform the citizen with reasonable precision what acts it intends to prohibit, so that he may have a certain, understandable rule of conduct and know what acts it is his duty to avoid. The constitutional vice in a vague or indefinite statute is the

injustice to the accused in placing him on trial for an offense of whose nature he was given no fair warning.

> The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. But in view of the strong presumptive validity of an act of Congress, statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language. The uncertainty in a statute which will amount to a denial of due process of law is not the difficulty of ascertaining whether close cases fall within or without the prohibition of the statute, but whether the standard established by the statute is so uncertain that it cannot be determined with reasonable definiteness than any particular act is disapproved; and *a criminal statute is sufficiently definite of its terms furnish a test based on knowable criteria which men of common intelligence who come in contact with the statute may use with reasonable safety in determining its command.* (Emphasis added.)

Thus, it is clearly seen that the statutes here involved do not contravene the due process clause of the Fourteenth Amendment to the United States Constitution but are clear, definite, and valid enactments.

II

The Act Does Not Deny Freedom of Speech and Freedom to Learn.

Appellant, a school teacher at Central High School in Little Rock, Arkansas, has challenged the constitutionality of Arkansas Statute §§80-1627, 80-1628 on the grounds

that as a professional teacher her freedom of speech as guaranteed by the Arkansas and United States Constitutions is being curtailed and her rights infringed upon because the statutes prohibit her from teaching in the classroom the doctrine or theory of evolution, better known as Darwinism. Specifically, she alleged that her constitutional freedom of speech is guaranteed to her by the First and Fourteenth Amendments to the Constitution of the United States and by Article II, Section 6, of the Constitution of the State of Arkansas.

The intervenor below, the parent of two students in the School System of high school age, asserted as his basis for attacking the constitutionality of the anti-evolution laws his children's "freedom to learn," a right he claims is incompassed within the guaranty of free speech.

The conduct proscribed by Ark. Stat. Ann. §80-1627 may be best defined by quoting the statute *in toto:*

> §80-1627 — Doctrine of ascent or descent of man from lower order of animals prohibited. — It shall be unlawful for any teacher or other instructor in any University, College, Normal, Public School, or other institution of the State, which is supported in whole or in part from public funds derived by State and local taxation to teach the theory or doctrine that mankind ascended or descended from a lower order of animals and also it shall be unlawful for any teacher, textbook commission, or other authority exercising the power to select textbooks for above mentioned educational institutions to adopt or use in any such institution a textbook that teaches the doctrine or theory that mankind descended or ascended from a lower order of animals.

Ark. Stat. Ann. 80-1628 provides the punishment for violation of §80-1627 and imposes upon violators a fine not exceeding $500.00 and vacation by the convicted teacher of the position held in any educational institution or membership on any textbook commission.

The statutes were adopted in 1928; following affirmance by the Supreme Court of the State of Tennessee in 1927 of similar statutes in the renowned case of *Scopes v. State of Tennessee,* 154 Tenn. 106, 289 S.W. 363 (1927). Similar but not identical, the Tennessee anti-evolution law provided that, "It shall be unlawful for any teacher in any of the universities, normals and all other public schools of the State which are supported in whole or in part by the public school funds of the State, to teach any theory that denies the story of the devine creation of man as taught in the Bible, and to teach instead that man has descended from a lower order of animals." The plaintiff in that case was a teacher in a public school of a county in the State of Tennessee, and subject to a teaching contract between himself and the state. The plaintiff denied the story of devine creation of man as taught in the Bible, teaching instead the theory that man had descended from a lower order of animals. He was convicted of violating the Tennessee anti-evolution statute and punished by imposition of the minimum fine of $100.00.

On appeal, the Tennessee Supreme Court held:

> "[Plaintiff] was under contract with the state to work in an institution of the state. He had no right or privilege to serve the state except upon such terms as the state prescribed. His liberty, his privilege, his immunity to teach and proclaim the theory of evolution, elsewhere than in the service of this state, was in no wise touched by this law.

> "The statute before us is not an exercise of the police power of the state undertaking to regulate the conduct and contracts of individuals in their dealings with each other. On the other hand, it is an act of the state as a corporation, a proprietor, and employer. It is a declaration of a master as to the character of work the master's servant shall, or rather shall not perform. In dealing with its own employees engaged in its own work, the state is not hampered by the limitations of §8 of article I of the Tennessee Constitution nor of the Fourteenth Amendment to the Constitution of the United States."

After reviewing numerous cases in which the rule was well settled that a state has the right to regulate the conditions of employment of its servants, the court concluded, *supra*:

> "These cases make it obvious that the State government, as an instant to its power to authorize and enforce contracts for public service, 'may require that they shall be carried out only in a way consistent with its view of public policy, and may punish a departure from that way'."

Thus, the court reasoned that the State, pursuant to this power to regulate the condition of employment of its employees, could lawfully restrict the employees from teaching a subject deemed contrary to the policy of the state.

Dean Leflar in his discussion on *Legal Liability for* the Exercise of Free Speech, 10 Ark. L. Rev. 155 (1956), remarks that while Arkansas does not punish the act of blasphemy as such, he is of the opinion that the same ideological considerations prompted the legislature in Arkansas to pass the present anti-evolution laws. Doctor Leflar takes the position that these laws which relate to

the operation of the public schools, a recognized State function, probably would be sustained. He maintains that their effect is to regulate the work of public employees in their official duties which is an area of conduct outside constitutional guarantees insofar as the State should be permitted to make reasonable rules imposing speech limitations or even silence upon its own employees in the course of their employment. Leflar relies on the rationale of the *Scopes* case for his authority.

In attacking the statutes here involved which prohibit the teaching of the theory or doctrine that mankind ascended or descended from a lower order of animals, Mrs. Epperson argued that they denied her the constitutional right of freedom of speech (R.5). She asked that her employer should be enjoined from interfering with her right to teach or explain evolution (R.7).

She teaches biology in a public school (R.80). She is actually an employee of the State and stands in an employee-employer relationship to the State. She came before the Court and pled in effect, that her *ultimate* employer, the State, cannot tell her what services to perform and what services not to perform.

Her ultimate employer, the State, prohibits her by statute from teaching evolution, commanding her to be silent about this theory or doctrine. This is not an unusual situation. Most employers have certain things about which they command theeir employees to keep silent during their hours of employment; and certainly the State, as an employer, should be entitled to the same rights and privileges to which other employees are entitled.

Mrs. Epperson's liberty, her privilege, her immunity to teach and proclaim the theory of evolution, *elsewhere*

than in the service of the State is not touched by our statute. Only as an employee of the State is she affected thereby. She can teach evolution in a private school or a private forum, but when she is in the service of the State, she must do as the State, her employer, instructs. The State supports the school in which plaintiff teaches, providing her a forum. Taxes pay her salary. This gives the State some authority to determine what the school curriculum shall be.

Mrs. Epperson in the instant case disputes the authority of her ultimate employer, the State, and says that she is going to teach evolution anyway, "notwithstanding the provisions of said statutes" (R.5). In short, instead of arguing that she has a constitutional right of free speech, she should be and is, in reality, arguing that she has a constitutional right to be insubordinate to her employer.

It will be noted that in entering into her contract with the Little Rock School District — a subdivision the State of Arkansas — Mrs. Epperson agreed to the following provision contained in the contract:

> Both parties hereto agree that this contract shall be construed in accordance with all applicable laws and regulations governing the employment, compensation and conduct of teachers (R.39).

Thus, in accepting employment by the Little Rock School District, Mrs. Epperson not only impliedly agreed to subject herself to the conditions of employment demanded by her employer — a subdivision of the State — but she also specifically agreed that her employment should be governed by all applicable laws and regulations governing the conduct of teachers. We submit,

therefore, that she waived any right which she might have had to object to the conditions of employment when she agreed to the provisions of the contract.

There is an Annotation in 53 A. L. R. 832, entitled "Schools: extent of legislative power with respect to attendance and curriculum," which quotes from *People ex rel. Vollmar* v. *Stanley* (1927), 81 Colo. 276, 255 Pac. 610, as follows:

> The powers of the State, the children, and their parents over their education may be briefly but accurately stated thus: (1) state, for its own protection, may require children to be educated. This needs no citation. (2) Certain studies plainly essential to good citizenship must be taught . . . And, as a corollary, such studies may be required of every child. (3) Liberty is more than freedom from imprisonment. . . . The right to conduct a private school, the right of parents to have their children taught where, when, how, what and by whom they may judge best, are among the liberties guaranteed by §1 of the 14th Amendment of the United States Constitution. . . . (4) But these rights are subject to the qualifications (1) and (2) above, and that teachers and places must be reputable *and the things taught not* immoral or *inimical to the public welfare.* . . . (5) *Conversely, the teaching of what is* immoral or *inimical to the public welfare may be forbidden by the state,* even though taught as a moral or religious duty; *e. g.,* polygamy.

The word "inimical" is defined in Webster's New International Dictionary to mean " . . . unfavorable . . . opposed in tendency, influence, or effect; adverse." Certainly, it must be said that the teaching of evolution in the public schools is "*inimical* to the public welfare," *i. e.*, it is " . . . unfavorable . . . opposed in tendency,

influence, or effects; [and] adverse" to the public welfare. Therefore, under the holding of the Court in *People ex rel. Vollmar* v. *Stanley, supra,* as above quoted which holds to the effect that "the teaching of what is . . . inimical to the public welfare may be forbidden by the state" is directly in point and applicable to the case at bar.

The case of *Parker* v. *Board of Education of Prince George County, Maryland,* 237 F. Supp. 222 (1963), aff'd 348 F. 2d 464 (4th Cir. 1965), is also in point. In the *Parker* case, a teacher's contract was not renewed by the School Board and the teacher filed suit in Federal District Court, alleging, *inter alia,* that the Board's action of dismissal denied him the right of free speech guaranteed by the First Amendment to the Constitution of the United States. The Federal District Court held against the teacher, saying:

> The factual allegations contained in the complaint, and in plaintiff's affidavit, show no denial of freedom of speech. It is claimed that plaintiff's contract was terminated because a complaint had been received about his assigning and teaching from the book *Brave New World,* and that the book was thereafter removed from the library. There is no allegation that plaintiff's personal right to free expression was in any way inhibited by the school authorities.
>
> Even if such allegations were present, they would afford no ground for the relief sought in this case. The right of free speech or expression, like other First Amendment guarantees, is not absolute. Where the abridgment of the abstract right of free speech results from government action taken for the protection of other substantial public rights, no constitutional deprivation will be found to exist, *American Communications Ass'n.*

CIO v. *Douds*, 339 U.S. 382, 70 S. Ct. 674, 94 L. Ed 925 (1950). No unconstitutionality results where the right of free speech is reasonably curtailed as a prerequisite to continued government employment. *Ibid*, at p. 398; *United Public Workers of America* v. *Mitchell*, 330 U.S. 75, 95, 67 S. Ct. 556 (1947); Opinion of the Justices, 332 Mass. 785, 127 N.E. 2d 663 (1955).

Ark. Stat. Ann. §80-1628 (Repl. 1960) provides that "Any teacher . . . found guilty of this Act [teaching evolution] . . . upon conviction shall vacate the position thus held in any educational institutions of the character above mentioned . . . "

Therefore, Mrs. Epperson can be dismissed if she teaches evolution. "As a prerequisite to continued government employment," plaintiff must adhere to the requirements of the State Statutes. She stands in the same position in the case at bar as the plaintiff Parker stood in the Federal case above quoted, *i. e.*, neither of them has an absolute right to "free speech," if by this it is meant that they may completely ignore and disregard the wishes of their employer — the State — in the exercise of such right. It does not appear that the Supreme Court of the United States has passed on the precise point presented in the present case, *i. e.*, a state's power to prescribe the curriculum in public schools. It is true that the courts have held unconstitutional certain statutes prohibiting the teaching of foreign languages to students who had not completed a specific grade or course of study; however, we do not believe such decisions are controlling here, for these cases involve private or parochial schools, which the state attempted to include in a broad statute pertaining to all schools. Also, there is nothing "inimical" about the teaching of a foreign language. In the case of *Meyer* v. *State of Nebraska*,

262 U.S. 390, 400, 43 S. Ct. 625, 67 L. Ed. 1042, 29 A. L. R. 1446, which involved the teaching of a foreign language in a parochial school, the Court said:

> The power of the state to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. *Nor has challenge been made of the state's power to prescribe a curriculum for institutions which it supports. Those matters are not within the present controversy.* (Emphasis added.)

Thus, by dictum, the Court acknowledged that the decision would not have been the same had the statute applied to publicly-supported schools only.

We believe that the case in which the United States Supreme Court upheld the Hatch Act is analogous. *United Public Workers* v. *Mitchell*, 330 U.S. 75, 67 S. Ct. 556 (1947). In that case the Court upheld the right of the United States Government to curtail the free speech of its employees on the basis of the employer-employee relationship, recognizing the fact that this was within the rights of the government as an employer. In defining the issue, the Court said:

> When the issue is thus narrowed, the interference with free expression is seen in better proportion as compared with the requirements of orderly management of administrative personnel.

Here, plaintiff's right to free expression must be balanced with the State's right to seek orderly management of administrative personnel of the school system and orderly management of the curriculum. The United States Supreme Court, in discussing the Hatch Act, said:

> Thus we have a measure of interference by the Hatch Act and the Rules with what otherwise would be the freedom of the civil servant under the First, Ninth and Tenth Amendments. . . . Of course, it is accepted constitutional doctrine that these fundamental human rights are not absolute.

We submit that neither are Mrs. Epperson's rights absolute, and that the evolution statutes, like the Hatch Act, are valid even though they interfere to some extent with plaintiff's free expression. There must be an orderly management of the curriculum, and the evolution statutes aid in this objective.

Analogous also is *Adler* v. *Board of Education*, 342 U.S. 485, 96 L. Ed. 517, 72 S. Ct. 380, 27 A. L. R. 2d 472 (1952), where the Supreme Court upheld a New York statute which provided that a person who teaches or advocates or who is knowingly a member of an organization which teaches or advocates the overthrow of the government by force or violence shall be disqualified from employment or continued employment in the public school system. In its opinion, the Court said:

> It is first argued that the Feinberg Law and the rules promulgated thereunder constitute an abridgment of the freedom of speech and assembly of persons employed or seeking employment in the public schools of the State of New York.
>
> It is clear that such persons have the right under our law to assemble, speak, think and believe as they will. *American Communications Asso. C.I.O.* v. *Douds* 339 U.S. 382, 94 L. Ed. 925, 70 S. Ct. 674. It is equally clear that they have no right to work for the State in the school system on their own terms. *United Public Workers* v. *Mitchell*, 330 U.S. 75, 91 L. Ed. 754, 67 S. Ct. 556. They may work for the school system upon the

reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere.

* * *

. . . A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. . . .

We wish to emphasize by paraphrasing that Mrs. Epperson may work for the school system upon the reasonable terms laid down by the proper authorities of Arkansas. If she does not choose to work on such terms, she is at liberty to retain her beliefs and associations and go elsewhere for employment. She is not required to work in the Little Rock school system; she is not a victim of involuntary servitude.

A 1961 case from Florida also seems to be in point, wherein a teacher challenged a rule prohibiting university employees from seeking election to public office. The Florida Supreme Court held against his contentions in *Jones* v. *Board of Control*, 131 So. 2d 713 (1961), discussing "academic freedom" in the following language:

> We now proceed to the assault on the rule on the basis of appellant's constitutional claims. It appears to be the position of Professor Jones that the restriction imposed upon college professors prohibiting them from seeking public office encroches on their rights as citizens to run for public office and impinges on their liberty generically described as "academic freedom".
>
> Nowhere in the briefs are we supplied with a definition of the term "academic freedom" or the

outer limits thereof if any are recognized to exist. This apparent shortcoming in the otherwise excellent briefs is quite understandable for the simple reason that in none of the authorities mentioned and in none of the authorities discovered by our own research is the term given any definitive meaning. As contended for by the appellant, however, we understand the expression "academic freedom" to comprehend a claimed privilege of scholars and academicians and teachers generally to teach without restriction either to subject matter or as to limitation on collateral activities. Should we adopt literally the position of the appellant, it appears to us that we would be compelled to concede that a license to teach in a public school system is subject to no regulations whatsoever regarding either the nature of the subject matter to be taught or the time and effort that may be required to be devoted to the classrooms.

We should not lose sight of the fact that Professor Jones is insisting upon continued public employment in a public institution in the face of a violation of a rule apparently in full force and effect when he was engaged for the service and which we must assume that he knew, or should have known, particularly in view of his professional stature as a lawyer and a law professor.

Although we might appropriately do so, we find it unnecessary to approach a solution through the narrow corridor suggested by Justice Holmes in his descriptive dictum that "The petitioner [a policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe* v. *City of New Bedford*, 155 Mass. 216, 29 N.E. 517. To this end, we do not find it necessary to restrict our perspective to the limited concept, in a measure now outmoded, that a person has no constitutional right to government employment. We think that we can dis-

> pose of our problem on a much broader plateau of reasoning with the view that any right which an individual does have to work for the government or to continue in the public employ or to seek public office must necessarily be subject to all *reasonable* rules and regulations promulgated by the government in the interest of the public and for the well-being of the public services. The appellant claims the right to teach in a State institution pursuant to his contract. The appellee simply replies with the assertion of the power to promulgate *reasonable* regulations of the appellant's conduct of his employment in the interest of the public and particularly the students who depend upon the professor for their instruction. (Emphasis supplied.)

Counsel for appellants stated at the trial that if the teaching of evolution were detrimental to the public welfare, then it should be prohibited in parochial and other private schools the same as in public schools. As we have pointed out elsewhere in this brief, the courts have held that, while the State can regulate what is taught in the public schools, it does not have the same authority with respect to private schools. In other words, the right of individuals and groups to conduct private schools with a minimum of regulation by the State is one of the rights guaranteed under the freedom of speech amendment and one of the purposes and objectives of this amendment. This does not mean, however, that the State is prohibited from exercising any control over the curriculum taught in the State-supported public schools. The courts have held that the right of freedom of speech is not absolute, *i.e.*, the party exercising it must do so with due regard to the rights of others. Our laws prohibiting libel and slander are a curtailment of the right of freedom of speech; nevertheless, they are valid enactments and serve to protect the rights of the public from

the spoken or printed word of an individual who might seek to exercise his freedom of speech to the detriment of others.

In a Federal District Court opinion in 1965, *Bradford* v. *School District No. 21*, 244 F. Supp. 768 (1965), we find the following:

> No individual as a matter of right has a constitutional privilege to be in the public employ as a school teacher; and all teachers in public schools are subject to *reasonable* rules and regulations by state and local school officials. (Emphasis supplied.)

It would seem that the test under which the evolution statutes must be judged is that of reasonableness, *i.e.*, whether they constitute a reasonable restraint on plaintiff's right to free expression.

There is a complete lack of proof by the plaintiff that the challenged statutes have had any adverse, unfavorable, or unreasonable effect upon the school children, their parents, or the community in which they live. On the contrary, Mrs. Epperson and Mr. Blanchard both testified that not a single parent or other interested party had ever complained to either of them of any adverse effect due to the existence of these statutes (R.161, 162, 178). Also, the defendant produced as witnesses before the Court highly reputable and experienced school superintendents and/or administrators who testified under oath that the statutes had had no adverse effect upon the schools at which they were employed in any manner whatsoever (R.116, 168). These school administrators also testified that they had received no complaints from parents or other school patrons to the effect that they felt the theory of evolution should be taught in the schools

(R.164, 167). The plaintiff has wholly failed to prove the unreasonableness of these statutes.

There is a strong presumption that the statutes are valid. As was said in *Berry* v. *Gordon*, 237 Ark. 547, 376 S.W. 2d 279 (1964), "Every presumption must be indulged in favor of the constitutionality of an act of the legislature."

These statutes have been on the books since 1929. They have stood unchallenged for thirty-five years. In 16 C.J.S., Constitutional Law §99, p. 443, it is said: "The presumption in favor of the constitutionality of a statute is especially strong where such constitutionality has long been acquiesced in." A case in point is *McEachin* v. *Martin*, 193 Ark. 787, 102 S.W. 2d 864 (1937), wherein the Arkansas Court said:

> In approaching the decision of this question the well-established rule of construction should be kept in mind that legislation will not be declared unconstitutional unless obviously so, and that all reasonable doubt upon the subject must be resolved in favor of the constitutionality of the legislation.
>
> . . . .
>
> The Act of 1903 has now been in effect for thirty-four years, during all of which time its validity has been unquestioned by bench or bar, and while this practice is not conclusive, it is highly persuasive of the validity of section 18. Section 608, chapter on Statutes, 59 C.J. 1023; Lewis' Sutherland on Statutory Construction, vol. 2 (2d Ed.) §477.

Two of our neighboring states have similar statutes: Tennessee (Tenn. Code Ann. §49-1922, enacted 1925)

and Mississippi (Miss. Code Ann. §§6798, 6799, enacted 1926). These two states evidently regard the statutes as being reasonable. The only challenge to either of these was the *Scopes* case, and there the Tennessee statute was held to be valid. The *Scopes decision* was in 1927; since then the evolution statutes have gone unchallenged.

Every state has statutes in regard to its school curriculum; this is an area of legitimate legislative concern. Arkansas has statutes on school subjects other than the evolution statutes. Ark. Stat. Ann. §80-1613 (Repl. 1960) requires that American History be taught; Ark. Stat. Ann. §80-1614 (Repl. 1960) Arkansas History; Ark. Stat. §80-1617 (Repl. 1960), Physical education; Ark. Stat. Ann. §80-1618 (Repl. 1960), the effects of alcohol and narcotics; Ark. Stat. Ann. §80-1620 (Repl. 1960), Conservation. Would appellees also contend that these statutes are invalid?

A school curriculum should not be in a state of chaos. It must be subject to reasonable rules and regulations. To add to or subtract from the designated subject prescribed by law would create an intolerable situation whereby prescribed subject matter would of necessity be shunted aside in favor of some extraneous material that an employed teacher thinks should be substituted, which, as you can see, could easily operate to the detriment of prescribed courses. Mrs. Epperson seeks to substitute her judgment on matters of curriculum for that of the State for the judgment and wishes of a majority of the voters. If she should prevail, there would be no limitation on what any teacher would be permitted to substitute and teach for the prescribed curriculum in the public schools of Arkansas. The State must maintain control over its employees, school teachers, and over the curriculum of its schools.

The Chancellor (later reversed by the Arkansas Supreme Court) below found the Arkansas statute involved to be unconstitutional, relying, it seems, upon *Bartels* v. *Iowa,* 262 U.S. 403, 67 2 ed. 1047 (1923). That case involved a parochial school, not a public school. The case was reversed upon the authority of *Meyer* v. *Nebraska,* 262 U.S. 390, 67 L. ed. 390 (1923) which pointed out that no "challenge [has] been made of the state power to prescribe a curriculum for institutions it supports." The *Bartels* case is just not in point.

We believe that the statutes are a reasonable regulation of the employment of teachers in public schools. They are a reasonable regulation of the curriculum of public schools. Appellants had the burden of showing that they were unreasonable; and appellants have failed to carry that burden.

III

The Act Does Not Deny the Equal Protection of the Law.

Appellants contend for their third point that the statute is void under the equal protection of the law clause of the 14th Amendment to the Constitution of the United States.

Appellants contend that the police power may not be exercised except where there is a clear and present danger to the people of the state or it is exercised for the health, safety and welfare of its people.

On this we disagree. We believe that in the employer-employee relationship such a situation is not required. In the employer-employee cases, what is de-

terminative is not whether there is a "clear and present danger" but whether the rules and regulations are reasonable. The validity of these statutes does not have to depend, however, on the authority of the State to enact them under its police power, since the State clearly has the authority to enact them irrespective of its police power.

Appellants assert that the statutes fall under the equal protection clause because the statutes apply only to the public schools and do not apply to parochial or other private schools.

The error of the appellants, we believe, is that "students" is a broad classification and the classification should be broken down into public, private, and parochial schools.

The "students" attending public schools are not in the "same classification" as students attending the other two types of schools. If there is proper classification, then the statutes do not run afoul of the equal protection clause. 16A C.J.S., Constitutional Law, §505 (b) (2), p. 314. For a case somewhat in point, see *Steele* v. *Sexton*, 234 N.W. 436 (1931), wherein it was held that there was no merit to the contention that a ban on fraternities in public schools discriminated in favor of private schools.

The separate classification of students attending public, parochial, or other private schools is a valid classification. The State has a vital interest in its public schools, and may validly exercise more control over them than over strictly private schools.

IV

The Act Does Not Deny Religious Freedom.

The appellants also claim that they are denied freedom of religion because of the statutes prohibiting the teaching the Darwinian Theory. The purpose of the statute is not necessarily to protect the Christian religion, but we believe that the people of the State of Arkansas have a right to pass such legislation for reasons other than the protection of their religious beliefs. Even if the facts were that the law was enacted to keep theories out of public schools which would contradict the story of the creation of the earth, as set forth in the Christian Bible, it still would not be unconstitutional.

In the case of *Scopes* v. *State, supra,* Mr. Chief Justice Green, speaking for the Tennessee Supreme Court said:

> The last serious criticism made of the act is that it contravenes the provision of §3 of article 1 of the Constitution (of Tennessee), "that no preference shall ever be given, by law, to any religious establishment or mode of worship."
>
> The language quoted is a part of our Bill of Rights, was contained in the first Constitution of the state adopted in 1796, and has been brought down into the present constitution.
>
> At the time of the adoption of our first Constitution, this government had recently been established and the recollection of previous conditions was fresh. England and Scotland maintained state churches as did some of the Colonies, and it was intended by this clause of the Constitution to prevent any such undertaking in Tennessee.

We are not able to see how the prohibition of teaching the theory that man has descended from a lower order of animals gives preference to any religious establishment or mode of worship. So far as we know, there is no religious establishment or organized body that has in its creed or confession of faith any article denying or affirming such a theiry. So far as we knew, the denial or affirmation of such a theiry does not enter into any recognized mode of worship. Since this cause has been pending in this court, we have been favored, in addition to briefs of counsel and various amici curiae, with a multitude of resolutions, addresses and communications from scientific bodies, religious factions, and individuals giving us the benefit of their views upon the theory of evolution. Examination of these contributions indicates that Protestants, Catholics, and Jews are divided among themselves in their beliefs, and that there is no unanimity among the members of any religious establishment as to this subject.

Furthermore, chapter 27 of the Acts of 1925 *requires* the teaching of nothing. It only *forbids* the teaching of the evolution of man from a lower order of animals. . . .

As the law thus stands, while the theory of evolution of man may not be taught in the schools of the state, nothing contrary to that theory is required to be taught. . . .

Our school authorities are therefore quite free to determine how they shall act in this state of the law. Those in charge of the educational affairs of the state are men and women of discernment and culture. If they believe that the teaching of the science of biology has been so hampered by chapter 27 of the Acts of 1925 as to render such an effort no longer desirable, this course of study may be entirely omitted from the curriculum of

> our schools. If this be regarded as a misfortune, it must be charged to the legislature. It should be repeated that the act of 1925 deals with nothing but the evolution of man from a lower order of animals.
>
> It is not necessary now to determine the exact scope of the religious preference clause of the Constitution and other language of that section. The situation does not call for such an attempt. Section 3 of article 1 is binding alike on the legislature and the school authorities. *So far we are clear that the legislature has not crossed these constitutional limitations.* If hereafter the school authorities should go beyond such limits, a case can then be brought to the courts. (Emphasis added.)

The State cannot "establish religion" and neither should it be allowed to disestablish religion. It is more reasonable for the State to prohibit the teaching of evolution in the schools than to allow it to be taught. If prohibited, the non-governmental agencies, *e.g.*, churches and scientific societies than have to debate the issues in non-governmental arenas, not in the public schools. Our evolution statutes help to make the schools of the State of Arkansas neutral in controversial matters concerning science and religion and are an aid in effectuating the separation of church and state.

We call attention to the concurring opinion of Mr. Justice Chambliss in the *Scopes* case, *supra,* wherein, in discussing the Tennessee evolution statute, he said:

> Considering the caption and body of this act as a whole, it is seen to be clearly negative only. not affirmative. It requires nothing to be taught. It prohibits merely. And it prohibits, not the teaching of any theory of evolution, but that theory

(of evolution) only that denies, takes issue with, positively disaffirms, the creation of man by God (as the Bible teaches), and that, instead of being created, he is a product of, springs from, a lower order of animals. No authority is recognized or conferred by the laws of this state for the teaching in the public schools, on the one hand, of the Bible, or of any of its doctrines or dogmas, and this act prohibits the teaching on the other hand of any denial thereof. *It is purely an act of neutrality.* Ceaseless and irreconcilable controversy exists among our citizens and taxpayers, having equal rights, touching matters of religious faith, and *it is within the power of the Legislature to declare that the subject shall be excluded from the tax-supported institutions, that the state shall stand neutral,* rendering "unto Caesar the things which be Saesar's and unto God the things which be God's," *and insuring the completeness of separation of church and state.* (Emphasis added.)

We submit that Initiated Act No. 1 of 1928 is "purely an act of neutrality" and insures the "completeness of separation of church and state."

CONCLUSION

The Supreme Court of Arkansas in its Per Curiam opinion (*State* v. *Epperson*, 242 Ark. 922) held that Initiated Measure #1 of 1928, Ark. Stat. Ann. §80-1627 and §80-1628, was a valid exercise of the state's power to specify the curriculum in its public schools. The Supreme Court of Arkansas expressed no opinion on the question whether the Act prohibits any explanation of the Theory of Evolution or merely prohibits teaching that the theory is true; the answer not being necessary to a decision in the case, and the issue not having been raised.

We submit that the Supreme Court of Arkansas was correct in its opinion and that its judgment entered thereon should be affirmed.

Respectfully submitted.

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